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Supreme Court of the United States

OCTOBER TERM, 1945

No. 5

STATE OF NEW YORK and SARATOGA SPRINGS COMMISSION and SARATOGA SPRINGS AUTHORITY,

Petitioners,

v.

UNITED STATES OF AMERICA.

SUPPLEMENTAL BRIEF FOR THE STATE OF NEW YORK

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We are conscious of the limited potentialities of an additional brief submitted at this stage of the case, and shall endeavor to avoid repetition. The briefs already submitted for the States answer substantially all that has been said by the United States.*

What we wish mainly to emphasize in this brief is that adoption of the principles urged by the United States would lead this Court into a new and uncharted sea of uncertainty. The United States would have this Court use the present case, in effect, as a vehicle for a declaratory judgment as to the validity of various unspecified future

* We add here as a matter of information the citation of *Arlington Hotel Co.* v. *Fant*, 278 U. S. 439, which we mentioned during the argument, as illustrating a comparable federal activity.

taxes upon state activities, or of the repeal of exemptions enacted in the belief that they were required by the Constitution. It seems to be conceded that the nature of our federal system imposes some limits upon the taxing power of the Federal Government, to which the word "nondiscriminatory" does not provide an all-sufficient answer. If this Court departs from the previously accepted standards it will be inviting a welter of new litigation to redefine the boundaries. The suggestion at the argument that Congress might tax public power activities of the states while continuing to sponsor federal power projects illustrates just one of the inevitable problems.

New York's suggestion that the case should be decided by comparison with the *Brush* and *South Carolina* cases (Supp. br., p. 50) involves no such complication; nor does the test of whether the State is serving the public health, safety and welfare, a test which was not only pronounced in the *Brush* case (300 U. S. at 371), but has been applied in other fields of state action (cf. *Treigle* v. *Acme Homestead Ass'n*, 297 U. S. 189; *Veix* v. *Sixth Ward Building & Loan Ass'n*, 310 U. S. 32, 41).

The United States argues (Supp. br., pp. 9-10) that because other types of tax or regulation may impinge upon state activities, the States have no need of immunity from taxes laid directly upon them. It might be urged with equal force that sales taxes and use taxes impose such burdens upon the Federal Government that direct taxation of federal activities should also be permitted. But the Federal Government has not only secured constitutional immunity from direct taxation; it has even found it necessary to devise new procedures to escape the burdens of indirect taxation (cf. Note, *Tax Avoidance by the Federal Government*, 19 St. John's L. Rev. 117). This argument should have no greater validity against the States than against the United States.

To characterize state immunity as a "subsidy" (U. S. Supp. br., p. 17) implies a predetermination of the issue. Under the teaching of the Court's prior decisions, state immunity is merely the price of maintaining our federal system of local self-government through the forty-eight states. The price has not proved unduly burdensome in the past, and there is no evidence that it is becoming so. As for the suggestion that a tax might be invalid if applied to private property but not to state property, one of the cases cited in our brief on reargument points out the justification for classifying private corporations differently from activities conducted by a municipal corporation (see *Puget Sound Power & Light Co.* v. *Seattle*, 291 U. S. 619, 624)—a classification which has been repeatedly made in the past.

The United States fears lest this Court strike down the power of Congress for the unforeseeable future, but the *South Carolina* case shows that this Court can always retain some measure of control. (Thus answering Mr. Justice Bradley's fears in *Collector* v. *Day*, 11 Wall. at 129.) On the other hand, the type of judicial self-abnegation which the United States proposes will leave the States at the mercy of Congress for the unpredictable future, without their being able to look to this Court as the ultimate and impartial umpire between state and nation.

This Court's judicial competence is not restricted to common law issues or statutory construction. One of the important phases of its exercise is the resolving of problems of how far the States may exercise their reserved powers under particular factual settings without infringing upon the powers committed to Congress (cf. *California* v. *Thompson*, 313 U. S. 109; *Parker* v. *Brown*, 317 U. S. 341, 359-68). That is essentially the type of issue which is involved here.

The suggestion made at the argument, that although the the present case involves only a small amount, nevertheless "many little things make much", and that the case should be viewed as if there had already been the greatest conceivable multiplication of state transactions; is equivalent to an argument that since the last straw breaks the camel's back, not even one straw should be allowed. Mr. Justice Holmes pointed out the fallacy in this assumption when he stated in *Panhandle Oil Company* v. *Mississippi*, 277 U. S. 218, 223, that "In those days it was not recognized as it is today that most of the distinctions of the law are distinctions of degree. If the States had any power it was assumed that they had all power, and that the necessary alternative was to deny it altogether."

The attorney for the United States argued that the claim of state immunity "rests really on the apprehension that unless immunity is granted, somehow the existence of the state is threatened." This is a curious reversal of reasoning. The apprehension in the *South Carolina* case was lest immunity be carried so far that the Federal Government be destroyed. The case is not one of a state coming as a suppliant and craving the boon of immunity, but rather presents a problem of whether the Federal Government has any right to tax another government which is of equal importance in the light of the Constitution—and to what extent, if any taxation must be permitted in order to preserve the Federal Government. That the United States is arguing for a radical change in the rules of immunity was made apparent when counsel stated the problem as being whether the time has not come "to abandon" the immunity.

The announcement, in the setting of this rather narrow litigation, of a new principle of intergovernmental relations not essential to a decision of the case, would unbalance the scales. This is not a time when the United

States needs protection against the States. It is rather a time when local self-government should be encouraged, in order that there may be no unnecessary obstacle to free experimentation in meeting the diverse problems of our era.

The judgment under review should be reversed and the complaint dismissed.

Dated, Albany, N. Y., December 11, 1945.

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